Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 23-104-1992
KC VOHRAH J
15 JULY 1993

Civil Procedure *— Injunction — Setting aside — Misleading averments in statement of claim and affidavit — Whether sufficient to justify discharge of injunction*

Companies and Corporations *— Lifting the veil of incorporation — Sale and purchase agreement executed by firm and not by defendant company — Whether contracts entered into by defendant company prior to incorporation — Whether 'founding subscribers' were promoters — Specific Relief Act 1950 s 26*

Contract *— Conditional contract — Specific performance — Delay in seeking specific performance — Whether still entitled to injunction*

The defendant company applied to set aside an injunction restraining the company from selling, charging or leasing two lots of land, one lot being registered in the name of the company and the other in the name of an individual as trustee. The plaintiffs based their application for the injunction on sale and purchase agreements alleged to have been entered into between the defendant company and the plaintiffs or the original purchasers who assigned their rights to the plaintiffs. However, all the agreements (except for one) were entered into with a firm and not the defendant company.

Held, setting aside the injunction:

(1) The statement of claim and the affidavit of the first plaintiff were misleading and did not disclose that the sale and purchase agreements (except for the one entered into by the seventh plaintiff) were entered into with a firm, not the defendant company. All the facts must be laid before the court, otherwise the injunction may be set aside without regard to the merits. Therefore, the misleading averments were enough to justify the discharge of the injunction.

(2) The plaintiffs stated that the persons who executed the sale and purchase agreements were the 'founding subscribers' of the defendant company. However, there was no evidence that the subscribers were promoters of the defendant company. In fact, there was nothing in the agreements to say that the contracts were entered into by the defendant company, or by any person on behalf of the defendant company, before its incorporation.

(3) The corporate veil could not be lifted as the founding subscribers of the defendant, who signed on behalf of the defendant, no longer appeared to control the defendant company.

(4) The seventh plaintiff was not entitled to specific performance as the contract was a conditional contract and 16 years had passed since the purchase of the said land.

[Bahasa Malaysia summary

Syarikat defendan telah memohon untuk mengetepikan suatu injunksi yang menghalang syarikat itu daripada menjual, menggadai atau memajak dua lot tanah, yang mana satu lot telah didaftarkan dalam nama syarikat itu dan yang satu lagi di dalam nama seorang individu sebagai pemegang amanah. Plaintif telah membuat permohonan untuk injunksinya berdasarkan perjanjian jual-beli yang dikatakan telah diikat oleh syarikat defendan dan plaintif atau pembeli asal yang telah menyerahhak mereka kepada plaintif. Akan tetapi, kesemua perjanjian (kecuali satu) telah diikat dengan sebuah firma dan bukan syarikat defendan.

Diputuskan, mengetepikan injunksi itu:

(1) Pernyataan tuntutan dan afidavit plaintif pertama mengelirukan dan tidak mendedahkan bahawa perjanjian jual-beli tersebut (kecuali yang diikat oleh plaintif ketujuh) telah diikat dengan sebuah firma dan bukannya dengan syarikat defendan. Semua fakta mesti dibentangkan di hadapan mahkamah, jikalau tidak injunksi itu mungkin diketepikan tanpa menimbang meritnya. Oleh itu, tegasan yang mengelirukan itu adalah memadai untuk menjustifikasikan pelepasan injunksi itu.

(2) Plaintif mengatakan bahawa orang yang melaksanakan perjanjian jual-beli dengan mereka atau pembeli asal merupakan pemohon beli asas (founding subscribers') syarikat defendan. Tetapi tidak ada keterangan bahawa pemohon beli itu merupakan penganjur syarikat defendan. Lebih-lebih lagi, tidak terdapat apa-apa di dalam perjanjian itu yang menyatakan bahawa kontrak itu telah diikat oleh syarikat defendan, atau sesiapa yang bertindak bagi pihaknya, sebelum pemerbadanannya.

(3) Tabir perbadanan tidak boleh diselak kerana pemohon beli asas syarikat defendan, yang menandatangani bagi pihak defendan, tidak lagi kelihatan sebagai mengawal syarikat defendan.

(4) Plaintif ketujuh tidak berhak untuk menuntut pelaksanaan spesifik kerana kontrak itu merupakan suatu kontrak bersyarat dan 16 tahun sudah berlalu sejak tanah itu dibeli.]

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02–420–93.]

Notes

For cases on setting aside injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1028–1037, 1040–1041, 1097–1100 and 1147.

For cases on conditional contracts, see 3 *Mallal's Digest* (4th Ed) paras 956–958.

For cases on the lifting of the veil of incorporation, see 3 *Mallal's Digest* (4th Ed) paras 161–166.

Cases referred to

1 *R v Kensington Income Tax Commissioners* [1917] 1 KB 486 (folld)
2 *Boyce v Gill* (1891) 64 LT 824 (folld)
3 *Siporex Trade SA v Comdel Commodities Ltd* (1986) 136 New LJ 538; [1986] 2 Lloyd's Rep 428 (folld)
4 *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (distd)
5 *Jones v Lipman* [1962] 1 All ER 442; [1962] 1 WLR 832 (distd)

Legislation referred to

Specific Relief Act 1950 s 26

Ng Choo Hock (*Anuar Bahari* with him) (*Sykt GB Neoh Ng & Anuar*) for the plaintiffs.

Kamilah bte Kasim (*Shahinuddin & Ranjit*) for the defendant.

Cur Adv Vult

KC Vohrah J: This is an application by the defendant company to set aside an injunction restraining the company from selling, charging or leasing land comprised in two lots ('the said land') in Mukim Pekula, Daerah Kuala Muda, Kedah, ie Surat Putus 16703, Lot 263, (registered in the name of the defendant company on 20 April 1980) and Surat Putus 16706, Lot 318 (registered in the name of Tan Ah Bee on 15 May 1979 as trustee).

The ten plaintiffs aver, in para 3 of their statement of claim, that they bought portions of the said land from the defendant company. This averment is, however, not true. From the various confusing exhibits filed in this case, together with the affidavits to which they are attached, what is revealed is that only the seventh plaintiff bought a portion of the said land from the defendant company. The seventh plaintiff also bought, together with the rest of the plaintiffs, except for the eighth plaintiff, other portions from a firm by the name of Sykt Pemaju Tanah Tikam Batu. The eighth plaintiff and also the ninth plaintiff were assigned, with the consent of the defendant company, portions of the said land by persons who had originally bought them from the same firm. What emerges therefore, is that only the seventh plaintiff who had bought a portion of the land from the defendant company had privity of contract with the defendant company, not the rest.

In support of the application for the injunction, the plaintiffs also relied on para 5 of an affidavit affirmed by the first plaintiff (encl 3) which repeated that the sale and purchase agreements were entered into between the plaintiffs and the defendant company.

Thus, although the sale and purchase agreements and the assignments were exhibited in encl 3, the fact remains that para 2 of the statement of claim and para 5 of the affidavit of the first plaintiff were misleading and did not disclose that the sale and purchase agreements (except for the one entered into by the seventh plaintiff) were entered into with a firm, not the defendant company. It has been stated that all the facts must be laid before the court and nothing suppressed (see *R v Kensington Income Tax*

Commissioners[1]) otherwise the order of injunction may be set aside without regard to the merits (see *Boyce v Gill*[2]). In any event, in this case it is necessary to bear in mind what was stated by Bingham J in *Siporex Trade SA v Comdel Commodities Ltd*[3] at p 539, discharging a Mareva injunction, inter alia, for failure to make full and fair disclosure:

> ... an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.

In my view, the misleading averments, in both the statement and the affidavit supporting the application for the injunction, would be sufficient to justify the discharge of the injunction.

Subsequent affidavits filed by the plaintiffs after the application was made by the defendant company to discharge the injunction state that the person who executed the agreements with the plaintiffs or original purchasers (who assigned their rights to some of the plaintiffs), was either one Tan Ah Bee or Ghazali bin Mat Isa who, counsel for the plaintiffs say, were 'founding subscribers' of the defendant company. Section 26 of the Specific Relief Act 1950 states:

> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —
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> ...
>
> (e) when the promoters of a public company have, before its incorporation, entered into a contract, the company:
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> Provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

There is no evidence to show that the two persons mentioned were promoters of the defendant company and, then again, that is not pleaded. In fact, the relevant sale and purchase agreements mention the 'vendors' as the firm and there is nothing in them to say that the contracts were entered into by the defendant company prior to its incorporation or by any person on behalf of the defendant company before its incorporation.

Counsel for the plaintiffs also argue that the court is entitled to look at all the circumstances and lift the corporate veil and to look at the fact that Tan Ah Bee and Ghazali bin Mat Isa who signed on behalf of the firm became founding subscribers of the defendant company, and he relies on *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd*[4] and *Jones v Lipman*.[5] He also points out that some of the plaintiffs who had been

assigned certain portions of the said land by original buyers from the firm had the assignments consented to by the defendant company. It is disclosed that in 1976, when all the agreements were signed, neither of the two pieces of the said land belonged to Tan Ah Bee or Ghazali bin Mat Isa or even the defendant company. The recitals in the agreements merely stated that the vendors had agreed to purchase from the registered proprietors of the said land. There was another original subscriber of the defendant company in 1976 in addition to Tan Ah Bee and Ghazali bin Mat Isa, but in 1992, the year of the application of the issue of writ by the plaintiffs and the application for the injunction, about 16 years after the purchase by the plaintiffs of their portions of land, there is no evidence to show that Tan Ah Bee and Ghazali bin Mat Isa still remained as shareholders. From the affidavit of one of the directors of the defendant company (encl 23), it appears that the shareholders of the defendant company and its new directors who administer the company joined the defendant company in 1987 and all the directors do not know about Tan Ah Bee directly or indirectly. It has to be noted too, that Surat Putus 16703 was transferred to Tan Ah Bah (as trustee) in 1979, who then, on 20 April 1980, transferred it to the defendant company. As for Surat Putus 16706, the land was transferred to Tan Ah Bee on 15 May 1979 as trustee, but there is no evidence as to who he is holding the land in trust for. It appears that the defendant company presently only owns one piece of property but what is not shown is to which person and when, between 1979 and 1992 (when the writ was filed), either Tan Ah Bee or Ghazali bin Mat Isa transferred his share in the defendant company. At this late stage in the life of the defendant company, after 16 years, in the absence of evidence to the contrary, it would appear that neither Tan Ah Bee nor Ghazali control the company and the cases of *Aspatra Sdn Bhd*[4] and *Jones*[5] are not quite relevant as they show that the defendants, in both the cases, wholly owned and controlled the assets of companies, the veils of which were lifted. It seems to me, the issue of lifting of the corporate veil cannot prevail in this case.

As for the seventh plaintiff, in respect of the sale and purchase agreement entered into between him and the defendant company, there was a recital to the effect that the company 'had entered into an agreement to purchase from the registered proprietors' the said land and that the company had agreed to sell to him a portion of the said land on terms and conditions in the agreement. Under cl 3 of the agreement, the company undertook to do several acts in consideration of the purchaser paying instalments within stipulated times, one of which was 'to apply for and obtain approval for the conversion, amalgamation and sub-division leading to a separate title for the portion sold' (see cl 3(b)). Clause 7 provides that in the event of the sub-division plan not being approved within four years from the date of the agreement (27 September 1976), then the purchaser was at liberty to give written notice of his intention to rescind the agreement. There was provision for refund of all moneys paid, together with interest.

This year is 1993 and there is still no approved sub-division plan and no written notice was ever given by the seventh plaintiff to the defendant company to rescind the contract. The contract was a conditional contract.

Then again, cl 9(a) provides that save, inter alia, for cl 7 (just mentioned) 'should the vendor for any other reason whatsoever be unwilling to sell [the said portion of land] to the purchaser, then the purchaser shall be entitled to an action for specific performance'. This clause reinforces the conditional nature of the contract, the condition being that approval for sub-division leading to a separate title for the sold property should be obtained within four years from the date of the agreement — and if that condition was not fulfilled there could not be specific performance. In any event, the plaintiff has not explained why he allowed 16 years to pass before he decided to sue for specific performance against the defendant company. The court does not even know if the portion of land he bought is comprised in Surat Putus 16703, Lot 263 (registered in the name of the defendant company on 20 April 1980) or in Surat Putus 16706, Lot 318 (registered in the name of Tan Ah Bee on 15 May 1979 as trustee). In my view, the seventh plaintiff is not entitled to the injunction.

In the result, the injunction granted to the plaintiffs is discharged. Costs to the defendant company.

Application allowed.

Reported by Lim Chee Wee